

Remarks

Claims 33 and 78 are amended. Claim 33 is amended to cure a typographical error. Claim 78 is amended to broaden its scope.

In response to the Restriction Requirement issued October 26, 2004, Applicant elects invention II, designated as claims 25, 26, 28-32 and 68-87.

Applicant further provisionally elects claims 68-87 (said to correspond to species “D” in the Office Action) the neoprene seal of claim 75, and amended claim 78 with traverse.

With respect to the various other elections suggested by the Examiner on pages 4-6 of the Office Action, a prima facie showing of a valid species election requirement has not been made.

“There are two criteria for a proper requirement for restriction between patentably distinct inventions:

(A) The inventions must be independent (see MPEP § 802.01, § 806.04, § 808.01) or distinct as claimed (see MPEP § 806.05 - § 806.05(i)); and

(B) There must be a serious burden on the examiner if restriction is required (see MPEP § 803.02, § 806.04(a) - § 806.04(i), § 808.01(a), and § 808.02).” M.P.E.P. §803.01.

“Every requirement to restrict has two aspects: (A) the reasons (as distinguished from the mere statement of conclusion) why the inventions *as claimed* are either independent or distinct; and (B) the reasons for insisting upon restriction therebetween . . . “ M.P.E.P. §808.

The Examiner must set forth his reasons for holding that inventions are independent or distinct. M.P.E.P. § 816.

“Claims to be restricted to different species must be mutually exclusive. The general test as to when claims are restricted, respectively, to different species is the fact that one claim recites limitations which under the disclosure are found in a first species but not in a second, while a second claim recites limitations disclosed only for the second species and not the first. This is frequently expressed by saying that claims to be restricted to different species must recite the mutually exclusive characteristics of such species.” MPEP 806.04(f).

The Examiner has simply set forth no reasoning for numerous elections shown in pages 4-6 of the Office Action except that in some circumstances the Examiner claims the election would facilitate examining. There is no discussion of any serious burden on the Examiner – as is required under M.P.E.P. §803.01. There is no discussion of the reasons why the inventions as recited in the respective claims are either independent or distinct - as is required under M.P.E.P. §§808 and 816. There is no assertion relating to mutual exclusivity – as is required under M.P.E.P. §806.04(f).

As an illustrative example, the Examiner in paragraph 8 has requested that Applicant elect one of pending claims 78 (before the current amendment) and 79 reproduced below:

78. The container of claim 68, wherein the at least a portion of the container is of circular cross section when the container is assembled.

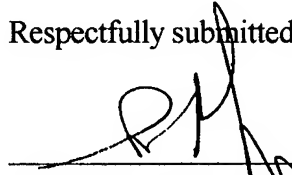
79. The container of claim 68, wherein the at least a portion of the container is of non-circular cross section when the container is assembled.

Clearly, no serious burden could be placed on the Examiner for searching the prior art for both of these claims. In actuality, the claimed invention has been put into practice using a container configuration that embodies both of these claims.

As such, the Examiner has not set forth a prima facie showing of a valid species election requirement. In light of the above, Applicant requests that the Examiner issue a Restriction Requirement in accordance with the M.P.E.P., a substantive Office Action on the pending claims, or a Notice of Allowance.

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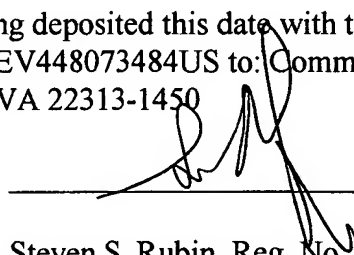
Respectfully submitted,


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Date


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